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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 691

ERIE-LACKAWANNA RAILROAD COMPANY,
Appellant,

— against —

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE PENNSYLVANIA RAILROAD COMPANY, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF APPELLANT, ERIE-LACKAWANNA RAILROAD COMPANY

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January 6, 1967

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF APPELLANT, ERIE-LACKAWANNA RAILROAD COMPANY

Certain preliminaries are in order, before our reply to the appellees.

The opinion and order of the Court below have now been reported. *Erie-Lackawanna Railroad Company* v. *United States*, 259 F. Supp. 964.

1

Developments before the Commission in the Penn-Central merger proceedings, F.D. Nos. 21989-21990.

As the Court will recall, on September 29, 1966 the Commission entered an Order providing for limited further hearing to determine (C-1)[1]:

> "*** (1) in what respects the conditions imposed in appendix G to its report and order of April 6, 1966, should be modified; (2) what, if any modification is needed to prevent manipulations of the type referred to by Chicago & Eastern Illinois Railroad Company and other petitioners; and (3) whether or not the capital loss indemnification should be imposed ***."

The Order further provided that item (3) should be "heard first in order that the Commission, if it so desires, may determine that matter prior to its determination of the matters set forth above in items (1) and (2)" (C-2).

I(A). Capital loss indemnification (item 3).

Hearings on this subject were held on nine days, commencing October 31 and ending November 18.

Briefs were exchanged on November 28 and on the same day there was an oral argument before the full Commission.

E-L is not contending on this appeal that the Commission's omission of a provision for capital loss indemnification is a ground for reversal of the Order appealed from.[2]

[1] Citations herein to A, B and C are to the portions of the Jurisdictional Statement in No. 642 which are thus lettered.

[2] See E-L's brief of November 30, at pages 20-21, particularly footnote 26.

I(B). The "protective conditions" and "manipulation" (items 1 and 2).

Hearings on items 1 and 2 were commenced on December 5, were held on nine days and concluded on December 16. Briefs are to be exchanged on January 16 and reply briefs on February 6; there are to be no Examiner's Report or oral argument.

While the Commission's Order numbered two items, the evidence at the hearings related to three subjects:

1. The traffic conditions.
2. The indemnification condition.[3]
3. The objections of the "unprotected carriers" that any indemnification condition would result in the diversion of traffic from them (the method of effecting the diversion being called "manipulation").

Even though the Commission has issued no further Order relating to these subjects, and briefs are not to be served until after the argument in this Court, we believe certain comments about the hearings to be permissible.

If before the commencement of the hearings anyone still doubted that the drafting of satisfactory protective conditions is a complicated and difficult matter, any such doubt should now have been dispelled.[4] It is hard to imagine a sharper contrast than that between the assumption in the majority opinion[5] below that the conditions really posed no

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[3] As distinguished from capital loss indemnification. See E-L brief of November 30 at pages 20-21.

[4] At the hearings which began on December 5 and ended December 16, there were 20 witnesses and 53 exhibits were received in evidence, of which 19 were prepared statements of witnesses ranging in length from 4 pages to 58 pages.

[5] See for example the statement at A-29 about what could be learned from a "mere reading of their text" and the prophecy at A-31 as to the scope of the evidence at the further hearings. That prophecy was very wide of the mark.

problems and the realization of those who sat through the hearings that the traffic conditions at least presented a problem the solution of which depended upon unusual knowledge, skill and experience.

The "unprotected carriers" have told this Court that "it is entirely possible, if not likely" that satisfactory protective conditions cannot be devised.[6] E-L does not agree that the fashioning of satisfactory conditions is impossible, but it is certainly not a simple matter.

An outstanding development at the further hearings was the testimony of a Penn witness, Vice-President Large, as to his interpretation of the Appendix G traffic conditions. He seemed to be of the opinion that those conditions were intended only to prohibit things which the merged company was enabled to do because of the merger, and that, if after the merger one of the protected carriers had any complaint about a change in rates, routes or services, it would have the burden of showing that the change could not have been made if there had been no merger. He clearly did not think that they had anything remotely approaching the restrictive effects which Penn-Central counsel had told the Court below that they had (R. 2849-2853; 2855-2856; 2860-2861). Central called no witness on the subject.

Finally, in our view the record on the further hearings demolished the contentions of the "unprotected carriers" that effective protective conditions, to protect E-L, D&H and B&M, would "result in massive traffic diversions from their systems".[7] It is not to be expected that they will accept our view, but we consider it proper to state it because the assertions in the brief for the appellants in No. 642 on

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[6] See brief of November 30 in No. 642 at page 18.

[7] Brief for appellants of November 30 in No. 642 at page 36.

this subject are mere assertions which, we believe, have been proved to be without foundation.

II

Developments before the Commission in the N&W inclusion proceedings, F.D. No. 21510.

When E-L's brief of November 30 was filed hearings in F.D. No. 21510 on the petitions of E-L, D&H and B&M for inclusion in the *present* N&W System had been completed and briefs filed.[8]

On December 22 Commissioner Webb, Presiding Officer at the inclusion hearings, issued his Recommended Report and Order. Exceptions are due January 23 and replies to exceptions February 13.

Commissioner Webb found that the inclusion of all three carriers in the N&W System would be consistent with the public interest.

As to E-L and D&H, the Commissioner recommended terms of inclusion which in most respects conformed to the terms which those carriers had proposed. Terms of inclusion approved by the Commission and accepted by the E-L and D&H stockholders would be binding on N&W.

As to B&M, the Commissioner reported that terms equitable to both B&M and N&W, under which N&W would be *directed* to include B&M, could not be prescribed at this time. However, the Recommended Report and Order set forth terms on which N&W would be *authorized* to include B&M, if the terms proved acceptable to both B&M and N&W.

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[8] See E-L brief of November 30 at pages 13-15, including footnote 14.

The Recommended Report and Order represents significant progress toward the accomplishment of what E-L believes would be in the interest of E-L's shippers and connections, as well as its security holders—inclusion in the N&W System on terms which are "equitable to all parties involved", as contemplated by Appendix O to the Commission's Report in F.D. No. 21510 (324 I.C.C. at 148). But, of course, the attainment of that objective is by no means yet assured.

Commissioner Webb's Recommended Report contains findings to which reference is made later in connection with our comments about the conflicts between the "protected carriers" and the "unprotected carriers".

III

Developments relating to the New Haven.

While the statements made on the argument before the Court below on September 21, including particularly the concessions of Counsel for the New Haven Trustees, persuaded all three Judges of the Court that a reasonable delay in the consummation of the Penn-Central merger would not "imperil or even seriously delay" the inclusion of the New Haven in the merged company (A-20 through A-22; A-62, A-63), there has been a great deal of confusion about the New Haven in the past, and it seems not unlikely that what has been said in some of the appellees' briefs, or may be said on the oral argument, will tend to create confusion again.

The fundamentals of the relationship between the inclusion of the New Haven and a merged Penn-Central and the provision of adequate protection for E-L, D&H and B&M were succinctly stated by Judge Weinfeld (A-62, A-63):

> "The dire consequences foreseen by some for the bankrupt New Haven hardly finds support in the facts.

> The estimates of time required for negotiations among the various parties and necessary activities to conclude statutory approval by both the Commission and the reorganization court extend up to a two-year period. As New Haven representatives candidly conceded upon argument, there is no reason why these activities cannot run apace while the Commission reconsiders and finally determines the protective requirements issues."

Nevertheless, an effective campaign has created a widespread impression that the preservation of railroad service by the New Haven is dependent upon an immediate consummation of the Penn-Central merger and some of the appellees' briefs give that impression.

There have been many developments relating to the inclusion of the New Haven in a merged Penn-Central since the argument in the Court below, and some of the most important of them have taken place since the appellants' briefs were due on November 30. However, while the brief for the New Haven Trustees refers, more or less incidentally, here and there to some of such developments (as, for example, in footnote 9 on page 10), neither the New Haven Trustees' brief nor any other briefs of the appellees contains an adequate consecutive statement of recent developments or an explanation of the present situation.

Rather than prepare such a statement ourselves, we attach as Appendix A hereto a copy of relevant portions of the Report and Order on Prehearing Conference of Hearing Examiner Arthur S. Present dated December 21, 1966 (released December 27). The asterisks in Appendix A indicate where portions of the Report and Order have been omitted in printing. Examiner Present's Report and Order contains a short narrative (Appendix A, p. i-ii), before stating the participants and positions, the

issues, the stipulations, and the directions with respect to the submission of evidence and procedures. It at least gives some idea of the "necessary activities" to which Judge Weinfeld referred, although the Court will appreciate that it relates only to a single hearing and does not, because it could not, indicate what will happen after the hearing either before the Commission or in the reorganization Court.

Examiner Present directed that the hearing start on January 16, 1967, with certain material to be distributed earlier (Appendix A, p. vii-viii).

With respect to the time which the presentation of the case on behalf of the New Haven Trustees will take, counsel for the Trustees said (Transcript of Conference of December 19, p. 82):

> "I will guess that the trustees' case and the cross examination on that case must be assumed to require a month."

No one can forecast how much time others may require.

There is a major legal issue whether the Trustees' "two-step plan", under which substantially all of the assets in the New Haven's reorganization estate would be transferred to Penn Central, without any vote by any class of security holders, is a "plan of reorganization" within the meaning of subsections b, d, e and f of Section 77 of the Bankruptcy Act. The New Haven Trustees have not described the "two-step plan", but it is referred to in Judge Anderson's Memorandum of Decision of October 24 (Appendix B to the brief of the New Haven Trustees) at page B2 and elsewhere, and the legal issue is referred to twice in Examiner Present's Report and Order (Appendix A, pages v and vi).

One major issue of fact is whether the terms of the plan are "fair and equitable" to the New Haven's security holders. Six parties are listed in the Examiner's Report as "Interveners in Opposition to Terms of Proposed Plan"; three are Trustees of Mortgages (Appendix A, p. iii-iv).

There is no need to mention other issues of law or fact, major or minor. Two things are clear:

The efforts of E-L and D&H in the Court below and in this Court to obtain adequate protection have in no way impeded the "necessary activities" relating to the inclusion of the New Haven to which Judge Weinfeld referred and "there is no reason why those activities cannot run apace while the Commission reconsiders and finally determines the protective requirements issues".

Even if this Court were to affirm the Court below, those who favor the inclusion of the New Haven in a merged Penn-Central must follow a long road if the "two-step plan" is upheld as a lawful "plan of reorganization" and a still longer one if it is not.

IV

Developments before the Commission in N&W-C&O merger proceedings (the "Dereco Plan"), F.D. No. 23832.

On December 30 the Commission released an Order, dated December 23, providing that a hearing on the application of the N&W and C&O to merge, and for approval of their Dereco Plan (under which E-L, D&H, B&M, Reading and CNJ would be included in the enlarged N&W on terms proposed by N&W), should commence on April 17, 1967, before Hearing Examiner Edward L. Boisseree, with certain material to be distributed in advance not later than March 6, 1967.

In response to the request of E-L, D&H and B&M the Order provides:

> *"It is further ordered,* That the three interveners, Erie-Lackawanna Railroad Co., The Delaware and Hudson Railroad Corporation, and Boston and Maine Corporation, be, and they are hereby, authorized to delay presentation of their evidence in chief, and their cross-examination of applicants' witnesses and the witnesses of rail carriers in support thereof, with respect to these applications until after a final decision of the Commission in reopened Finance Docket No. 21510, *Norfolk & Western Railway Company and New York, Chicago & St. Louis Railroad Company—Merger, etc."*

V

The conflicts between the "protected carriers" and the "unprotected carriers".

These appeals are anomalous in that the conflicts between E-L and D&H, on the one hand, and N&W on the other hand, are at least as sharp as the conflicts between E-L (and D&H) and the applicants. Yet the leader of the unprotected carriers is the N&W, and counsel for the N&W who has had the principal responsibility for contesting the efforts of E-L and D&H in Finance Docket No. 21510 to be included in the present N&W System will make the opening argument in this Court on behalf of the appellants.

The positions of the other "unprotected carriers" conflict similarly with the interests of E-L and D&H except that C&EI has no such interest as the other unprotected carriers in the "Dereco Plan" proposed by the N&W and C&O.

As E-L has previously indicated, E-L is largely in agreement with the appellant unprotected carriers as to

the illegality of the Commission's Order of September 16.[9] However, E-L's interests conflict with the contentions advanced on behalf of the unprotected carriers in certain important respects.

It may be observed preliminarily that one reading the brief of the appellants in No. 642 might get the impression that the unprotected carriers were the leaders in challenging the provisions in the Report of April 6 relating to the Appendix G protective conditions. Actually, the first step was taken by E-L; it filed a petition dated May 12, 1966, in which, in support of a prayer for a modification of the effective date of the Commission's April 6 Order and an extension of time to file a petition for reconsideration and other relief, it advanced vigorous and detailed objections to the protective conditions on the grounds that (1) E-L had had no opportunity to present testimony and exhibits or make any argument (written or oral) with respect to the conditions and (2) they were not "just and reasonable", because of many defects in both substance and form.[10]

The appellants' brief in No. 642 says, at page 15, that in the Report of September 16 "the Commission found that 'valid issues' had been raised as to various aspects of these conditions"; it omits to state *by whom* the valid issues had been raised, although the Report specifically states that they had been raised by "the three protected carriers".[11]

Finally, appellants' brief in No. 642 does not state that E-L brought the first action in the District Court and that D&H intervened immediately in that action.

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[9] E-L brief of November 30 at page 15.

[10] E-L petition of May 12, 1966 at pages 2-18. Since the May 12 petition was superseded by the July 8 petition (Exhibit E to E-L's complaint, R. 462-646), a copy was not attached to E-L's complaint, but the May 12 petition is referred to in various places in Exhibit F to E-L's complaint (R. 648-661).

[11] B-41, lines 16-18.

It should also be observed that the appeals of the appellants E-L and D&H are bottomed squarely on the findings which the Commission made in its April 6 Report as to the essentiality of their service, and that unless they were "protected during the period necessary to determine their future, [the Commission] would not authorize consummation at this time, even though approving the merger".[12] The Commission made no findings that there should be protective conditions for the unprotected carriers or that they would be injured by protective conditions for the protected carriers. Indeed, the findings relating to the unprotected carriers which were made in its Report of September 16 would seem to be the contrary (B-40, lines 10-18).

If doubts should arise as to the right of the unprotected carriers to relief from this Court, those doubts should not affect E-L and D&H. This is important, even though it has been and is E-L's position that the protective conditions should have been the subject of a hearing and a decision by the Commission before it authorized consummation of the Penn-Central merger, and that at any such hearing the unprotected carriers would have had a right to be heard.

Since the Commission's April 6 Report was released on April 27, E-L and D&H have been strenuously and continuously engaged in trying to obtain effective protective conditions. The unprotected carriers have been opposing those efforts; as the months have gone by, their opposition has become more explicit and vigorous. The brief of the appellants in No. 642 says, at page 29:

> "The 'indemnity' arrangement creates an irreconcilable conflict between the three protected carriers and appellant unprotected carriers."

[12] E-L brief of November 30 at page 18, and Judge Weinfeld's dissenting opinion (A-43).

The conflict at the recent further hearings pursuant to the Commission's Order of September 29 was not limited to the "'indemnity' arrangement"; it covered many aspects of the protective conditions.

Underlying the conflict between the three protected carriers, on the one hand, and the N&W (and at least some of the other unprotected carriers), on the other hand, has been the determination of the N&W to resist inclusion of E-L, D&H and B&M in the *present* N&W System and to further the Dereco Plan of the N&W and C&O. This will be all too evident if one reads between the lines on pages 44-48 of the appellants' brief in No. 642.

Regrettably, the efforts of counsel for N&W and its associated appellants to further the Dereco Plan have led them to make some wholly unwarranted assertions about E-L at pages 45-46 of their brief. The entire paragraph which starts near the bottom of page 45 and runs over to page 46 consists (except for one sentence which does not relate to E-L) of unsupported derogatory assertions about E-L. It is said that:

> "The Erie-Lackawanna properties are in deplorable condition and much of its equipment is obsolete. Some $150 million will have to be expended to rehabilitate Erie-Lackawanna's road, structures and equipment."

The only citation which may have been thought to support these assertions is the reference in the preceding sentence to "the record in the pending inclusion proceeding". The assertions may correctly summarize N&W's *contentions* in that proceeding. However, Commissioner Webb's Recommended Report is highly critical of N&W's attempt to show, by evidence "based on inadequate inspection" and a "statistical approach" which the Commissioner considered "invalid", that E-L had "inadequate maintenance" and the

Commissioner recommends that the Commission "reject N&W's estimates relative to E-L and B&M deferred maintenance" (sheets 67-72).

In the same paragraph the brief asserts that the record in the pending inclusion proceeding shows that Erie-Lackawanna's stock has no value, and in a footnote relating to E-L's earnings it is said that "in no recent year, even the boom year of 1965, have Erie-Lackawanna earnings risen to the level of its fixed charges and full contingent interest". However, Commissioner Webb had this to say (sheet 75):

> "Beginning in 1963 with a net income deficit of $17.1 million, EL's management team by the 12 months ended June 30, 1966, had increased railway operating revenues by $28.4 million with only a $3.3 million increase in expenses and had achieved net income of $7.3 million."

He referred to E-L as having accomplished "one of the most sensational rehabilitations of railroad earning power ever accomplished in this country" and spoke of E-L's "superlative management since 1963" (*id.*). And his proposed terms for the inclusion of E-L in the N&W System necessarily reflected a conclusion that E-L's stock has substantial value (sheets 163-164).

REPLY ARGUMENT

A. Contentions and matters which can be disposed of summarily.

Before replying in any detail to the briefs on behalf of the Commission and that of The Pennsylvana Railroad Company and The New York Central Railroad Company (hereinafter "Penn-Central"), and to so much of the brief on behalf of the New Haven Trustees as relates to the New Haven, we will treat with certain contentions and matters that can be disposed of summarily.

A(1). The contention that E-L's appeal involves only private interests.

The brief of Penn-Central *may* suggest, in the sentence which starts at the bottom of page 19 and ends on page 20, that E-L's appeal merely purports to involve "considerations that to a degree touch the public interest" and relates "primarily to the private interests" of E-L and its security holders. Briefs of other appellees may contain assertions or hints along that line. However, the brief of the New Haven Trustees makes, and undertakes to support at length, a categorical charge that E-L's appeal and the appeals of the other carrier appellants involve only "the private interests of security holders" (p. 2-3; 23; 26-30).

It is difficult to imagine a more baseless charge.

E-L's appeal is bottomed on the Commission's findings in the April 6 Report (327 I.C.C. at 529-532), particularly the three which were quoted in Judge Weinfeld's opinion (A-43) and in E-L's brief of November 30 (p. 18). The first two of those findings refer entirely to the public interest, and say nothing about security holders. The third follows from the first two.

In addition to the three findings in the April 6 Report, it is pertinent to quote from the September 16 Report (B-39):

> "Our underlying purpose in appendix G of the prior report was to preserve for the shipping public dependent upon the protected carriers for transportation, the routes, gateways, rate benefits, and services available through those carriers."

The most extraordinary feature of the argument on behalf of the New Haven Trustees is the statement on

page 29 that the "distinction between the public and private interests was clearly delineated by Judge Weinfeld in his concurring opinion in *Gruss, et al.* v. *United States*", which is followed by a quotation from one of the paragraphs of that opinion and the attachment of a copy of the opinion as Appendix A to the New Haven brief. Judge Weinfeld did indeed delineate the distinction which he saw between public and private interests, and in doing so he pointed out that the basis for his dissent in the Court below in this case was based on the Commission's findings as to the public interest. We quote from the first and third paragraphs of Judge Weinfeld's short concurring opinion in the *Gruss* case as attached to the brief of the New Haven Trustees (omitting footnotes, which contain merely references to the Commission's Reports of April 6 and September 16 as printed in the I.C.C. Reports):

> "I join in the opinion of the Court: However, I deem it appropriate to note an additional distinction between this case and *Erie-Lackawanna R.R.* v. *United States*. In the *Erie* case the Commission found that the public interest required protection of the three carriers against the adverse effects of the merger, and as a condition of consummation imposed specific protective terms which it subsequently revoked ex parte, in my view without adequate supporting findings, as to one condition and left for future determination as to others. * * *
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> * * * *
>
> "In *Erie*, on the other hand, the terms and conditions left for future determination had, in my opinion, a vital bearing upon the public interest. Those terms, according to the Commission, were essential for the protection of the smaller carriers, the shippers, passengers and the communities they serve. * * *"

A(2). The contention that E-L and the other railroad appellants seek only delay.

The assertion that the railroad appellants merely seek delay is closely related to the contention just discussed. The brief of the New Haven Trustees says (p. 26-27):

> "The interests that will receive the primary benefit from a delay in consummation of the Penn-Central merger are those of the security holders of the railroad appellants and not the interests of the public in appellants' continued ability to render adequate rail service. For some appellants, delay keeps alive a bargaining advantage which draws its strength from preventing the merger from being consummated before inclusion of E-L, D&H and B&M in N&W or Penn-Central has been effected."

We are at a loss to know what "bargaining advantage" counsel for the New Haven Trustees have in mind.

The unsupported assertion is the exact opposite of that made by the State of New York on the argument in the Court below, which was in substance endorsed in the majority opinion, that a consummation of the Penn-Central merger "would act as a spur to bringing [E-L, D&H and B&M] and the N&W together on a basis fair to all".[13] Thus we now have diametrically opposite assertions by counsel for two appellees, neither of which is supported by a word in any Commission Report or in the record.

A(3). The charge that E-L has been guilty of laches.

From time to time several of the appellees have asserted that the jeopardy in which E-L finds itself is its own fault,

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[13] See E-L brief of November 30 at pages 80-81, containing a quotation from footnote 4 at page A-10 of the majority opinion.

because it should have petitioned earlier for inclusion in the N&W System.

In the briefs filed on behalf of the appellees in this Court there seems to be no explicit assertion to that effect except by counsel for the State of New York, who say that one of the two reasons for the litigation is "the failure of E-L, D&H and B&M to move for and secure prompt inclusion in the N&W system" (p. 4). In saying this—as almost uniformly throughout the entire brief on behalf of the State of New York — an assertion is made for which no support is cited, which is not even explained with any particularity, and which is not correct.

Commissioner Webb's Recommended Report and Order in the inclusion proceedings, F.D. No. 21510, to which we have referred at pages 5-6 above, contains no suggestion that E-L should have filed its petition for inclusion in the N&W System sooner than it did.

Under Appendix O to the Commission's Report in the N&W merger case, 324 I.C.C. at 148, E-L had five years from the date of the Order, or until June 24, 1969, to file its petition. Its petition was actually filed on September 28, 1965, so that it took only about a year and a quarter out of the five allowed. The record does not show what happened in the year and a quarter i.e., how much time was spent in what proved to be fruitless efforts to negotiate with the N&W, in formulating E-L's inclusion proposal and in preparing to support it. Any charge that E-L was dilatory is wholly unwarranted.

A(4). The Boston and Maine.

Several of the appellees refer to the fact that the B&M did not appeal from the Order of the Court below.

E-L was not consulted about the B&M's decision not to appeal, and would be unable to speak for the B&M if it were suitable for it to do so.

Commissioner Webb's Recommended Report and Order in F.D. No. 21510 may put B&M in even greater jeopardy than E-L, and it may well be that B&M's decision not to appeal to this Court will prove to have been a mistake of judgment unless this Court grants the relief requested by E-L and D&H and this Court's Order inures to the benefit of B&M to the same extent as if it had appealed.

In any event, there would appear to be no reason why E-L or D&H should be adversely affected by B&M's decision not to appeal.

A(5). The absence of any opposition to the merger "on the merits".

The appellees emphasize (as did the Commission and the Court below) the fact that none of the railroad appellants have taken the position that there must under no circumstances be a Penn-Central merger (see, for example, the brief of the Commission at pages 29, 37 and 42, and the Penn-Central brief at pages 5, 19 and 20).

E-L's comments on this aspect of the case can be brought into focus by quoting from pages 29-30 of the Commission's brief (footnote omitted):

> "A most remarkable feature of this case is that no one of the plaintiff-appellant railroads attacked the proposed Penn-Central merger on its merits — none challenged the Commission's *basic findings*[18a] which led it to conclude unanimously that the merger would be 'consistent with the public interest'."

[18a] Italics are supplied in this brief unless otherwise indicated.

E-L's position is that the *basic findings* made by the Commission included those with respect to E-L, D&H and B&M and the protective conditions. As we note later, the treatment in the Commission's brief and the Penn-Central brief of those findings is open to the most serious challenge.

E-L does not take the position that there must not be a Penn-Central merger, but it does take the position that in order for such a merger to be consummated there must be a compliance with the applicable statutes. The respects in which E-L considers that there has been a failure to comply with such statutes are set forth in E-L's complaint (R. 354-363).

A(6). "Ancillary matters" and "ancillary power".

The brief of the New Haven Trustees refers to the protective conditions as *"ancillary matters"* (p. 23, 33). Surprisingly, the brief of the Commission argues that the Commission "possesses the *ancillary* power to reserve for further prompt reconsideration, while permitting consummation of the Penn-Central merger, the special conditions for their protection in the interim between consummation and their inclusion in a larger system" (p. 39-40).

E-L's position is that, in the light of the findings in the Commission's Reports, there is no justification for a characterization of the protective conditions as "ancillary matters" or of a postponement until after the merger of the determination of the protective conditions as merely "ancillary". In this connection we refer to Judge Weinfeld's opinion in the *Gruss* case, mentioned above at page 16, not because that opinion is in any way binding but because it summarizes concisely and correctly what the Commission found in its Penn-Central Reports.

B. Reply to briefs on behalf of the Commission and Penn-Central and a portion of the brief on behalf of the New Haven Trustees.

In what is to follow we will undertake to reply to the briefs on behalf of the Commission and Penn-Central.

Except to the extent that we have already replied to the brief on behalf of the New Haven Trustees, our reply to their brief will be limited to the portion (pages 39-46) which undertakes to establish that "further delay poses a substantial threat that the merger will abort and that the public interest in survival of the New Haven's essential operations will be frustrated." We see no reason to reply to the balance of the New Haven brief.

The importance of preserving the New Haven is not disputed. The question is: Is it necessary because of the New Haven to put E L, D&H and B&M in the most serious jeopardy in order to have a "prompt consummation" of the Penn-Central merger?

A very large portion of the New Haven brief undertakes to cover ground covered in the Commission and Penn-Central briefs. Except for so much of the Summary of Argument as relates to the New Haven, this is true of everything from the middle of page 10 to the point on page 39 where the discussion of the New Haven starts. We had not supposed that the Commission and Penn-Central needed any help from the New Haven Trustees on matters covered by the Commission and Penn-Central in their briefs, and, since we do not consider that they have received any help, we see no occasion to reply to the large portion of the New Haven brief which is referred to in this paragraph.

In replying to the briefs for the Commission and Penn-Central and so much of the New Haven brief as relates to

the New Haven, we will deal with subjects largely in the order in which they were treated in E-L's brief of November 30.

We reply herein to the brief for the State of New York and the joint brief for three New England States to the limited extent that such reply seems fitting, and in connection with the replies to the Commission, Penn-Central and the New Haven.

B(1). The Commission's findings and the protective conditions.

Perhaps the outstanding features of the briefs for the Commission and the Penn-Central are the gross inadequacy of their references to the Commission's findings (including a major error in the Penn-Central brief) and the absence of any significant reference to Judge Weinfeld's dissenting opinion, on which E-L's brief was largely built insofar as it dealt with the protective conditions.

B(1)(a). The Commission's April 6 findings.

Three of the Commission's crucial findings in the April 6 Report, all of which had been quoted in Judge Weinfeld's dissenting opinion (A-43), were quoted by E-L at page 18 of its brief. The third of the three is quoted in the Commission's brief at pages 24 and 61, but there is no reference to the other two. None of the three is mentioned in the Penn-Central brief at all.

A major error in the Penn-Central brief is to be found at page 56. Penn-Central's counsel apparently overlooked a fourth important Commission finding which E-L's brief quoted at page 19. The Penn-Central brief says (p. 56, footnote omitted):

> "The Commission did not there hold that the public interest would not permit prompt consummation of the

merger except with the prior adoption of the particular protective conditions there promulgated. Rather the holding of the Commission with respect to E-L, D&H and B&M was simply that 'unless they are protected during the period necessary to determine their future, we would not authorize consummation at this time, even though approving the merger' and that 'immediate consummation of the proposed merger would be consistent with the public interest, if conditions are imposed' to protect them. 327 I.C.C. at p. 532. The holding was thus that the public interest requires protection of the named carriers, but there is no suggestion in the Commission's report that it deemed the particular conditions there prescribed to be the only possible means of accomplishing this end."

The fourth Commission finding to which we refer was as follows (327 I.C.C. at 532):

"Our approval of the merger for undelayed consummation shall be subject, therefore, to the conditions specifically described in appendix G."

How could the Commission have said more clearly that it would not authorize "prompt consummation of the merger except with the prior adoption of the particular protective conditions" contained in Appendix G to the April 6 report?

Furthermore, as noted at page 19 of E-L's brief, when the Commission came to set forth its "Statutory Findings and Ultimate Conclusions", the paragraph in which the merger was approved as consistent with the public interest specifically mentioned "the various conditions set out in this report, including the appendixes", and those conditions were found to be "just and reasonable". This is not mentioned in the Commission's brief or the Penn-Central's brief. It is hardly necessary to add that Appendix G was one of "the appendixes".

The first four findings to which we have referred were quoted in full, and the pertinent portions of the fifth, by

Judge Weinfeld in his dissenting opinion (A-43 through A-45), as well as by E-L in its brief at pages 18-19. They represent the foundation stones of E-L's case in this Court. To write briefs which almost completely ignore them, as the Commission and Penn-Central have done, is to write about a different case.

B(1)(b). E-L's objections to the Appendix G conditions.

The Commission's brief states, at page 25-26:

> "Criticisms of the so-called Appendix G conditions imposed by the Commission centered largely upon their novelty and their having been imposed by the Commission without there having been a hearing upon them."

It then goes on to mention the criticisms of the indemnification condition and also the absence of any provision for capital loss indemnity. There is no suggestion that serious defects in the traffic conditions, in both substance and form, were the grounds of objections made by E-L, D&H and B&M.

E-L's petition for reconsideration and other relief contained vigorous, extensive and detailed objections to the traffic conditions approved in Appendix G. This was brought out in E-L's brief of November 30 at page 41 and in Appendix E thereto, with full citations to the record before this Court.

Judge Weinfeld correctly said (A-45):

> "The three 'protected' lines, E-L, D&H and B&M, challenged the traffic conditions as totally ineffective to achieve their intended purposes; they detailed their specific objections in comprehensive briefs filed with the Commission."

B(1)(c). The defects of the Appendix G traffic conditions, which will be operative until modified.

The defects in the traffic conditions as prescribed in Appendix G merit special discussion because, even if the traffic conditions be modified as a result of the further hearing, there is no assurance that any modified traffic conditions will be retroactive.

Since E-L attaches great importance to this point, E-L's brief covered it in detail, in the text at pages 41-43 and in Appendix E to the brief. Neither the Commission nor the Penn-Central has attempted any answer to what E-L said at the places just indicated. Indeed, neither of them has even indicated that the point exists.

This policy of silence on the part of the Commission and Penn-Central about the defects in the Appendix G traffic conditions is nothing new. The Commission's September 16 Report found that (B-41):

> "The three protected carriers, on petition, have raised valid issues as to interpretation, application, scope, and other aspects of the protection."

However, it did not say what the issues were, and it did not even undertake to deal, before authorizing consummation of the Penn-Central merger, with the defects which it would not have been difficult to cure (see, for example, pages xi-xiv of E-L's Appendix E to its brief of November 30).

Instead of discussing any of E-L's specific objections to the Appendix G traffic conditions, the Commission's brief refers to those conditions as "extraordinary" (p. 21, 61) and "unprecedented" (p. 24, 39), and it quotes the statement in the majority opinion below that they were "unprecedented in their severity in the history of railroad mergers" (p. 68).

After referring to the protective conditions, the Commission's Statement of the Case refers to E-L, D&H and B&M as "thus protected" (p. 25), as if they were admittedly protected fully or effectively. Later this is toned down, and it is said with respect to the traffic conditions specifically, that they "will afford significant protection against diversion of traffic" (p. 65). In such a context, what does the word "significant" mean?

The treatment of this subject in the Penn-Central brief is similar. At page 6 the brief gives the quotation from the majority opinion which will be found in the Commission's brief and has already been mentioned. In the Argument, the brief undertakes to answer the argument that the traffic conditions will not effectively prevent a substantial diversion of traffic, and says that the argument "was vigorously disputed by Penn and Central in the court below and is at best highly conjectural" (p. 41). Does the fact that the argument had been disputed by Penn and Central make it unsound? Can such an argument as is to be found at pages 41-43 of E-L's brief in this Court and Appendix E thereto be dismissed by saying that it "is at best highly conjectural?"

The Penn-Central brief then goes on with two quotations from the Court below, of which the first does not add anything to what had previously been quoted by both the Commission and Penn-Central, and the second is merely a short statement that the Court would not have enjoined consummation of the merger if Appendix G contained only the traffic conditions and the Commission had not issued a Supplemental Report (*id*).

Some miscellaneous arguments advanced in the brief of the Penn-Central are referred to later.

As to the effects of the Appendix G traffic conditions, which would now be in effect if the merger had been consummated on October 1, 1966, as it could have been if the Commission's Orders had not been stayed, two things can be said:

> First, there has *never* been an answer by the Commission or Penn-Central to any of E-L's objections to the defects in the Appendix G traffic conditions.
>
> Second, as to those conditions E-L admittedly never had a hearing until the further hearing pursuant to the Commission's Order of September 29, which commenced on December 5, and if the Penn-Central merger is consummated before modified traffic conditions become effective, E-L will have to try to live in the interim with the wholly inadequate protection of the Appendix G traffic conditions (and any additional protection which may be afforded by any Commission Order or Orders which may become finally effective).

B(1)(d). The absence of Commission findings in the September 16 Report.

As already noted (p. 23), the Commission's approval of the merger for "undelayed consummation" in the April 6 Report was subject "to the conditions specifically described in appendix G", and its statutory findings and ultimate conclusions as to both consistency with the public interest and the justice and reasonableness of the conditions related to the original Appendix G conditions. When the Commission took the drastic action provided for in its September 16 Report, by which the determination of the ultimate protective conditions was postponed until after the merger (except for the interim continuance of the original Appendix G traffic conditions) but the merger was approved for "undelayed consummation", it made no findings superseding or modifying those in the April 6 Report to which

we have referred. This was pointed out at pages 38-40 of E-L's brief of November 30.

We have found in the Commission's brief no reference to this subject.

The Penn-Central brief makes this argument (p. 40, footnote omitted):

> "By authorizing consummation of the merger [the Commission] has clearly expressed its conclusion and intention that the protective conditions finally formulated will provide all parties the protection to which they are entitled, and for the reasons shown that conclusion is plainly well founded."

It may first be observed that the question before the Commission, the Court below and this Court does not relate to the protection to which the parties "are entitled". It relates to the protection which is necessary in the public interest, and involves compliance with the finding relating to the public interest to which we have referred at pages 22-24. It may be added that, when counsel referred to "the reasons shown", we assume that they had in mind their own arguments; certainly the September 16 Report contains no "reasons" which would support a finding that, after a post-merger hearing, the Commission could fashion protective conditions which would meet the objectives stated in the April 6 Report.

The Penn-Central brief contains a long footnote at page 40 which we have omitted. The first three sentences, like the related text, read as if the Commission's responsibilities related only to competing private interests, not to the protection of the public interest. The footnote also refers to "the fulfillment of [the Commission's] obligations under the statute", not to the Commission's findings, the making of which were a step in the fulfillment of its obligations under Section 5(2)(c) of the Interstate Commerce

Act. Finally, by use of the intriguing words "ceremonial declaration" and "incantation", an effort is made to create the erroneous impression that the appeals of E-L and D&H are based on formalities. To have any chance of making a persuasive argument to that effect, Penn-Central would have to disregard the Commission's findings to which we have referred at pages 22-24 above. The shipping public which is "dependent upon the protected carriers for transportation"[14] is as much a part of the public embraced by the words "public interest" in Section 5(2) as the shipping public served by Penn or Central or to be served by the merged company.

Perhaps it is arguable that what the Commission did by its September 16 Report implies a conviction on its part that protective conditions could be devised which would meet the requirements of the April 6 findings with respect to the protection of E-L, D&H and B&M. We do not consider that such an argument would be sound. However, assuming *arguendo* that it would be, the September 16 Report would still clearly fail to meet the requirements of Section 8(b) of the Administrative Procedure Act, 5 U.S.C. § 1007(b), now 5 U.S.C. § 557(c), that there be a statement of "findings and conclusions, *as well as the reasons or basis therefor,* upon all the material issues of fact, law, or discretion presented on the record". The Penn-Central footnote on page 40 asserts "that there was a rational foundation for the Commission's determination that there are no insuperable obstacles to the fulfillment" of its task as described in the footnote. Laying to one side the point, already mentioned, that the footnote does not correctly state what the Commission's task is, it is too clear for dispute that it was for the Commission to set forth the "rational foundation" for its determination, if there was

[14] See 327 I.C.C. at 563, section 8 of Appendix G; and the finding at B-39 quoted above at page 15.

such a foundation. *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 167-168 (1962). See also *SEC* v. *Chenery Corp.,* 332 U.S. 194, 196 (1947).

B(1)(e). Did the Commission have the power to defer the determination of the protective conditions until after consummation of the merger?

The question referred to in the above subheading was discussed in detail in E-L's brief, without reference to the absence of appropriate findings (p. 49-61). The discussion was detailed because it was thought that this Court might consider it an important question of law on which the Court would be called upon to pass.

Several of the appellees deal with the subject as if E-L had contended that every detail of every condition involved in the authorization of every Section 5(2) transaction must be determined before the transaction can be authorized. E-L's brief made it abundantly clear that it made no such contention (p. 58-59). Its contention was that there was a limit beyond which the Commission could not go in deferring, until after the consummation of a merger, the determination of "just and reasonable" conditions, and that in this instance the Commission's Report of September 16 went beyond that limit (p. 58-61).

Neither the Commission's brief (p. 56-63) nor the Penn-Central brief (p. 25-30) contends that the Commission's powers to defer the determination of conditions until after a post-merger hearing is unlimited. Both cite decisions as supporting, or at least suggesting a basis for the support of, what the Commission did by its Report and Order of September 16.

In our view the cited decisions do not even tend to support what the Commission did. A review of the decisions is contained in Appendix B.

B(1)(f). Judicial review of any Commission Order prescribing protective conditions, if the merger has been consummated.

At pages 45-49 of E-L's brief it is shown that, if the merger had been consummated as contemplated by the Order below, E-L could never have had an effective judicial review of the protective conditions.

This point is discussed in the Commission's brief at pages 67-70, and in the Penn-Central brief at pages 30-33.

The issue was also dealt with in the majority opinion below (A-35 through A-37) and in Judge Weinfeld's opinion (A-59 through A-60).

Although the subject is obviously an important one, we do not think that the discussion of it in the appellees' briefs adequately answers what was said in the cited pages of Judge Weinfeld's opinion and E-L's brief. Accordingly, only two brief comments seem to us to be in order.

The Commission's brief suggests a "dissolution of the merger" as a possible outcome of a post-merger judicial review (p. 70), and argues that "the burdens of dissolution would fall on the applicant carriers—not the appellants" (p. 70). The suggestion that a Court might require a dissolution of the merger of two such railroads as Penn and Central is totally unrealistic; *FTC* v. *Dean Foods Co.* may be distinguishable, as the Commission argues, but it is much more unrealistic to envision a dissolution of a merger of Penn and Central than a dissolution of the two companies involved in *Dean Foods Co.* The comment that "the burdens of dissolution would fall on the applicant carriers—not the appellants" seems to disregard the fact that Penn and Central are important transportation agencies, and the merged company would be at least as important as the two of them combined. It is hard to conceive of a dissolution of a merger of them which would not seriously interfere with transportation services.

We find the argument in the Penn-Central brief rather cryptic, with its references to "outer boundaries" (p. 31) and "outer perimeters" (p. 32).

B(1)(g). The time during which E-L would suffer from a Penn-Central merger.

The temporary restraining order issued in the Court below, and this Court's Order of October 18, have already reduced the time of E-L's exposure to the adverse effects of a Penn-Central merger, as some of the appellees have pointed out.

The Commission's Order of September 29, the completion of the hearings relating to the protective conditions (items 1 and 2), the time schedule for the exchanges of briefs, and the omission of any requirement for an Examiner's Report or oral argument before the Commission afford grounds for *hope* that before many months the Commission will have approved modified protective conditions. But whatever hope or confidence may be justified, no one can forecast what the conditions will be, whether the Commission's Order will be the subject of litigation, or, if it is, what the duration or outcome of the litigation will be.

Commissioner Webb's recommended Report and Order in the Norfolk and Western inclusion proceedings justifies a hope that before the summer of 1967 the Commission will have approved the inclusion of E-L in the Norfolk and Western System on terms which E-L's Board of Directors will consider acceptable. However, no one can forecast how long a time will elapse thereafter before the inclusion actually takes place, even assuming an outcome favorable to E-L of any further steps taken by N&W before the Commission or of any litigation instituted by N&W

Any attempted appraisal of the time during which E-L will be subject to the serious, and perhaps catastrophic, effects of a Penn-Central merger must take into account that the provision in section 1 of Appendix G to the April 6 Report (327 I.C.C. at 561) as to the ending of the "protective period" is most unsatisfactory, because it is at least susceptible of the interpretation that the protective period would end, in the case of E-L, upon the issuance of an Order of the Commission approving E-L's inclusion in the Norfolk and Western System, and would leave E-L unprotected during (1) any time required by any subsequent litigation instituted by N&W, (2) the period which would be needed for E-L's stockholders' meetings and (3) the time needed for the steps which would have to be taken to effect the inclusion (see Exhibit E to E-L's complaint at pages 14-15; R. 480-481).

E-L has asked that the provision in Appendix G as to the ending of the protective period be amended to read as it reads in clause (b) of Section 1 of Appendix 1 to Exhibit E to E-L's complaint (R. 583), but the Commission has not yet ruled on this proposal.

To summarize:

While there have been developments since the decision of the Court below which inspire a reasonable hope that E-L's exposure to the adverse effects of a Penn-Central merger may be shorter than appeared probable when the Court below rendered its decision, no one can make a reliable forecast of the approximate duration of the exposure. Indeed, the situation involves enough uncertainties so that even an intelligent guess is impossible. But it is certain that the risk has not been eliminated of an exposure long enough to put E-L's ability to render satisfactory transportation service in great jeopardy.

B(1)(h). Miscellaneous contentions of the appellees.

The Commission's brief makes quite a point (p. 61-62) of a so-called "concession" in the D&H brief. The brief for Connecticut, Massachusetts and Rhode Island quotes (p. 9) the same paragraph of the D&H brief.

While, of course, a concession by the D&H would not bind E-L or determine the powers of the Interstate Commerce Commission, it is suitable to say that we do not interpret the quoted paragraph in the D&H brief as meaning what counsel for the Commission seems to say it means or as even possibly susceptible of the construction put on it at page 10 of the brief of the three States. We interpret what counsel for the D&H said as meaning that, if the Commission prescribes specific protective conditions and they survive any judicial review, and the merger consummation takes place later, the Commission has the power under Section 5(9) of the Interstate Commerce Act, *"for good cause shown"*, to modify the conditions originally prescribed. The words "for good cause shown" qualify the Commission's powers under Section 5(9), which is quoted in relevant part in footnote 15 on page 23 of the brief for appellants in No. 642.

That footnote states that Section 5(9) "is applicable only to orders that are necessary in the light of changed conditions"; we are not prepared to go that far, and it is unnecessary to do so, since the words "for good cause shown" certainly require that there must be either changed conditions or some other good cause for the modification of a Section 5(2) order. The assertion in the brief of the States (p. 10) that D&H says that "the Interstate Commerce Commission could change any conditions which it imposed prior to the merger as long as it had gone through the motions of imposing conditions prior to consummation" is frivolous.

Both the Commission's brief (p. 64) and that of Penn-Central (p. 42) refer, as did the Commission in its September 16 Report (B-14, B-15) and the Court below (A-30), to an answer given by E-L's Chairman and Chief Executive Officer (erroneously referred to by counsel for the Commission as also Chief Executive Officer of D&H) in the Norfolk and Western inclusion proceedings, F.D. No. 21510, to a question put by Commissioner Webb, the Presiding Officer. This matter was covered in E-L's Jursidictional Statement at pages 52-53. It is pertinent to add that Commissioner Webb's Recommended Report and Order in F.D. No. 21510 (see above, p. 5-6) makes no reference to Mr. White's answer to the question which the Commissioner put and gives no indication that any of the Commissioner's recommendations was influenced by that answer.

The Commission's brief (p. 67) and that of the State of New York (p. 21) quote from a paragraph in the reply brief filed on October 19, 1966 on behalf of E-L in the Norfolk and Western inclusion case, F.D. No. 21510. The substance of the quotation is an expression of confidence that the Commission could and would devise adequate protective conditions.

E-L's attorney on this appeal, who has been representing E-L in connection with the Penn-Central merger since April, 1965, has not represented E-L in F.D. No. 21510. However, he sees no inconsistency between anything which he has said on behalf of E-L and what was said in the small quotation from E-L's reply brief of October 19 in F.D. No. 21510. That reply brief was filed after this Court had issued its Order granting a stay and providing an expedited schedule for an argument of these appeals; the expression of confidence was certainly not intended to mean that E-L's appeal need not be successful.

The attorney who is representing E-L on this appeal has consistently taken the position, on behalf of E-L, that it is

not impossible to draft effective protective conditions, even though it is not a simple matter (see, for example, p. 3-4 above). He would certainly not be willing to express a lack of confidence that the Commission can perform that task, even though, as will have become abundantly clear, he does not think that the Report of April 6 and Appendix G contained satisfactory protective conditions. And for the reasons already set forth in full, the right to an effective judicial review of the Order which gives effect to the Commission's second effort to fashion satisfactory conditions is vital.

The quoted paragraph from the brief in F.D. No. 21510 was part of a reply argument of more than three pages that the effect "of a Penn-Central merger on EL's traffic will be more than offset by an EL-N&W merger". As we read Commissioner Webb's Recommended Report and Order, none of his recommendations was influenced by that portion of E-L's reply brief.

Conclusion as to the protective conditions.

E-L stands on the Commission's findings in its April 6 Report. They relate to the public interest. The Commission did not modify them in the September 16 Report. But the action which it took in its September 16 Report and Order cannot be reconciled with the findings.

This was pointed out forcefully and in detail in Judge Weinfeld's dissenting opinion (A-40 through A-65). It was pointed out again succinctly in the first and last paragraphs of his opinion in the *Gruss* case (brief of the New Haven Trustees herein, Appendix A). It was the main thread of E-L's argument in its brief of November 30.

The appellees' briefs do not face up to the issues relating to the protective conditions. There is an almost complete

lack of quotations of the findings. Instead, they quote characterizations in the majority opinion, and rely on arguments which are largely irrelevant to the issues presented.

B(2). The errors in the Commission's reasons for approving a "prompt consummation" of the merger.

E-L's Point I related to the errors in the portion of the Commission's September 16 Report at pages B-13 through B-16 entitled "TIME OF CONSUMMATION". Penn-Central agrees (p. 57-63) that there (328 I.C.C. at 311-313) the Commission gave its reasons for approving prompt consummation of the merger.

B(2)(a). "Indefinite delay".

A study of the brief for the appellants in No. 642 and of the briefs of the Commission and Penn-Central, in the light of what the Commission said in the section of the September 16 Report entitled "TIME OF CONSUMMATION", leads to certain conclusions.

The Commission *may* have been influenced in its decision in favor of "prompt consummation of the merger" by the thought that, if the merger were deferred until a merger of the N&W and C&O in F.D. No. 23832 (see above, p. 9-10) was ready to be consummated, the result might be a collapse of the effort to merge the Penn and Central and the liquidation of the New Haven. Major objections to this section of the Report are that it is really quite impossible to tell to what the Commission did refer, and there was no separate consideration of the following possible different periods of delay which could vary greatly in length:

1. Delay until the N&W-C&O merger was consummated or about to be consummated.

2. Deferment until E-L and D&H were included in the N&W System or some other major rail system.

3. Deferment until the Commission had provided protective conditions that would accomplish what the Commission had said in its April 6 Report should be accomplished.

The whole subject has been confused by the Commission's use of such words as "indefinitely", "several years or indefinitely", and "substantial postponement", as well as its somewhat more precise reference to a "delay of consummation of even six or twelve months" (B-13 through B-16).

The Penn-Central brief adds to the confusion (p. 21-24) by referring to the arguments of the "carrier appellants" and the "appellants" several times in such a way as to suggest that the protected carriers have the same objectives as the unprotected carriers.

E-L's position is that it should not be prejudiced by contentions of the unprotected carriers to which it does not subscribe, and that, whether or not the Penn-Central merger be postponed until E-L's future is really determined (see 327 I.C.C. at 532), and E-L believes that that would be a just result, E-L was at least entitled to have a delay of the consummation until it obtained the protection which, by undisturbed findings, the Commission has said that E-L should have in the public interest.

B(2)(b). The incongruous reference to the Appendix G conditions.

E-L's brief noted (p. 36, 65) that the Commission said (B-14):

> "*** (2) we have imposed in appendix G to the prior report (and applicants have accepted) unique conditions designed to maintain the traffic status quo for these three railroads pending final determination of their inclusion petitions; * * * ."

What the Commission said was incongruous, because later in the same Report the Commission substantially eliminated the Appendix G conditions except for the interim continuance of the traffic conditions (B-43 through B-45).

Both the Commission's brief (p. 53) and the Penn-Central brief (p. 11) purport to summarize what the Commission said, but neither quotes what it actually said or concedes that it referred specifically to conditions "imposed in appendix G to the prior report". They do not try to explain the Commission's error—they attempt instead to obscure it.

B(2)(c). The Commission's findings that the Penn and Central are in "a vulnerable and highly sensitive financial situation".

The appellees' briefs contain many references to the earnings and finances of Penn and Central. They speak in varying but rarely informative terms of the improvement of their earnings since the merger application was filed in March, 1962. Not one of the appellees' briefs gives these figures,

	Combined consolidated net income
1961, the last year before the filing of the merger application.....	$ 4,745,002
1965, the last year before the Commission approved the merger....	$122,469,097

Furthermore, in every year from 1962 through 1965 there was an improvement in the consolidated net income of the Penn and its consolidated subsidiaries and in the consolidated net income of the Central and its consolidated subsidiaries.

Yet the Commission referred in its Report of April 6 to the applicants' "vulnerable and highly sensitive financial

situation" (327 I.C.C. at 519) and quoted this characterization in its Report of September 16 (B-9, lines 3 and 4).

As to 1966, we quote from the communication which Mr. Saunders, Chairman of Penn's Board, sent to the Penn's stockholders on December 22, 1966 with the dividend which was payable on that date:[15]

> "Total dividend payments for 1966 amounted to $2.30 per share compared with $2.00 per share in 1965. The payments were made as follows:
>
> | Record Date | Payment Date | Amount |
> |---|---|---|
> | March 7th | March 25th | $.40 |
> | May 23rd | June 21st | .40 |
> | August 15th | September 13th | .60 |
> | December 5th | December 22nd | .90 |
>
> For the first three quarters of 1966 consolidated net earnings of the Pennsylvania Railroad System were $68.8 million or $4.94 per share compared with $54.1 million or $3.91 per share for the same period in 1965. The Pennsylvania Railroad Company had a net income of $33.4 million or $2.40 per share compared with $23.8 million or $1.72 per share for the same period in 1965.
>
> The extra dividend was declared on the basis of improved earnings for the first three quarters and the prospect of a continuation of good business conditions into next year.
>
> Notwithstanding the substantial improvement in earnings that has been achieved in recent years, net income and the rate of return on investment are still unsatisfactory. This points up the urgency for an early consummation of the merger with the New York

[15] We presume that this Court can take notice of the contents of this communication. According to Moody's Transportation Manual, Penn had more than 97,000 stockholders at the end of 1965 and the communication must have been sent to almost 100,000 people.

Central. We are pushing vigorously to consummate the merger at the earliest possible date."

The above quotation contains everything in Mr. Saunders' communication except the opening and closing paragraphs, neither of which is relevant.

We note later the contrast between what Mr. Saunders said in his December 22 communication to stockholders and his doleful testimony on November 16, at the hearing before the Commission in the Penn-Central merger proceedings relating to capital loss indemnification, as set forth in the Appendix to the brief of the three New England States.[16]

One would hardly expect Mr. Saunders not to push vigorously to consummate the merger and not to say that an early consummation is urgent. But certainly one can reasonably question the "urgency for an early consummation" in the light of Mr. Saunders' statement about "improved earnings for the first three quarters [of 1966] and the prospect of a continuation of good business conditions into next year".

Unless we have missed something, the only discussion in the Commission's brief about the financial situation and earnings of Penn and Central will be found at pages 16-17.[17] There the Commission quotes from the Examiners' Report, in which all the tables of earnings, income accounts and balance sheets ended with the year 1963. By that year the combined consolidated net income of Penn and Central had increased to $45,660,474, so that the two companies had realized approximately 35% of their total increase from 1961 to 1965.

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[16] Although no citation is given, the quoted testimony of Mr. Saunders is to be found at pages 21,008-21,011 of the transcript of the hearing on November 16, 1966.

[17] At page 55 the Commission gives in another connection certain figures of earnings per share "Actual" and "Pro forma". These are referred to later.

If the Commission's decision on September 16 in favor of a prompt consummation of the merger was substantially influenced by the earnings record of the two companies through 1963, to the exclusion of their record in 1964 and 1965, the decision was certainly erroneous. Furthermore, the increase in the earnings of the two applicants from 1961 to 1965 was one of the bases set forth in E-L's complaint for the relief which it sought (R. 359-361), and it had previously been dealt with at length in E-L's petition of July 8, Exhibit E to the complaint, at pages 70-78 (R. 536-544).

When the Commission acted on September 16, it knew the earnings through June 30, 1966. We now have Mr. Saunders' prophecy (applying at least to the Pennsylvania, whose increases have not been relatively as great as those of the Central) running to the end of 1967.

What is one to think now of the paragraphs in the Examiner's Report which the Commission's brief quotes at pages 16-17? Undoubtedly the Examiners did the best they could, using spectacles that apparently kept them from looking at actual figures subsequent to December 31, 1963, but why should they be assumed to have had a prophetic insight which they demonstrably did not have?

The Penn-Central brief rather coyly notes E-L's argument that "in 1965 and the first half of 1966 both carriers had earnings greater than in the immediately preceding years" (p. 59). The actual figures, as cited by E-L, are not given.

The Penn-Central argue that, in stating its reasons for concluding that "prompt consummation of the merger clearly would be in the public interest", the Commission did not rely upon a finding that Penn and Central were in a

"vulnerable and highly sensitive financial situation". This argument might have merit if the portion of the September 16 Report beginning at page B-13 through the ninth line at page B-16 could reasonably be considered completely separable from everything else in the Report. However, the second paragraph on page B-13 specifically refers to "the applicants' financial situation during the past decade". Just four pages before (B-9), the Commission had repeated a quotation from its April 6 Report which spoke of the applicants' "vulnerable and highly sensitive financial situation". The argument that the reference to the "vulnerable and highly sensitive financial situation" occurred in a portion of the Report where the Commission "discussed not the question of the precise timing of the merger but rather attacks made on its basic merits" is unimpressive. Both on page B-13 and on page B-9 the Commission spoke of the applicants' "financial situation", and there can be no sensible reading of what the Commission said on page B-13 which does not assume that it had in mind what it called, on page B-9, the applicants' "vulnerable and highly sensitive financial situation". Interrelated sentences or expressions close to each other in the same Report cannot be separated, as a surgeon might separate interrelated nerves in the human body, and treated as if they had no connection with each other.

B(2)(d). The New Haven.

It is submitted that the situation with respect to the New Haven can be summarized as follows:

1. There is no basis for a conclusion that a deferment of the Penn-Central merger, until adequate protective conditions have been fashioned, and will become operative on the consummation of the merger, will jeopardize the inclusion of the New Haven.

2. There is very little basis for a conclusion that an even longer deferment to allow E-L and D&H an opportunity to pursue their efforts to be included in the N&W System will seriously jeopardize the inclusion of the New Haven.

3. When the Commission wrote its September 16 Report, it did not have adequate knowledge about the New Haven situation. Its ignorance was the direct result of its failure to obtain more information than it had, although E-L had concluded its discussion of the New Haven in its petition of July 8 with the following paragraph (R. 558):

> "The uncertainties about the New Haven constitute a strong additional reason why the consummation of the Penn-Central merger should be deferred until the Commission is better informed than it is now; can exercise its judgment in the light of fuller information; and can make more informative findings than it was able to make on April 6, 1966, or can make now."

4. None of the appellees' briefs gives an intelligible consecutive explanation of what must be done before the New Haven is included in a merged Penn-Central or an analysis of the time which may reasonably be expected to be required. The same thing is true of all the appellees' briefs put together.

5. The idea has come to prevail that there is a close relationship between a "prompt consummation" of the Penn-Central merger and a continuance of the New Haven's transportation services. This has unquestionably been due largely to propaganda, although the Commission's press releases have contributed.

The press release which the Commission issued on April 27, 1966, the date when the April 6 Report was released, said at page 4 that "the Commission required the merged company to take over the passenger operations as well as the freight operations of the New York, New Haven and

Hartford Railroad". It also said that the Commission found that (p. 5).:

> "Without inclusion of the New Haven, undivided as between passenger and freight operations, the merger would not be consistent with the public interest."

In the press release issued the same day relating to the Commission's decision on the discontinuance of New Haven passenger service, the Commission said at page 2 that the Report relating to the Penn-Central merger "includes a requirement that the merged company absorb the New Haven, which has been in trusteeship since 1961, and operate both its freight and passenger service". It is not a cause for wonder that newspapers, magazines, news media, members of State legislatures and other State officials took these words to mean what they said, but it is indisputable that the April 6 Report did not require a merged Penn-Central to take over the New Haven: it required the merged company to make a conditional agreement to take over the New Haven if and when (1) certain conditions specified in section 8 of Appendix A to the April 6 Report (327 I.C.C. at 553) are met and (2) there is a compliance with the requirements of §77 of the Bankruptcy Act as to the reorganization of the New Haven.

At page 38 the Commission's brief says:

> "The Commission conditioned its approval of the Penn-Central merger upon the inclusion of the vital freight and passenger operations of the bankrupt New Haven, and the applicants have accepted this condition."

(See also the sentence starting at the bottom of page 53 and the quotation at the top of page 54). The statement in the Commission's brief at page 38 about the Commission's act is not correct. If the Commission's Report and Order of September 16 had not been stayed, the Penn-Central merger could have taken place on October 1, 1966 and no

one could have forecast then, or can forecast now, whether or when the New Haven would be included in the merged company (see Appendix A hereto).

We do not find any attempt in the Penn-Central brief to show that a delay of consummation of the Penn-Central merger until adequate protective conditions are assured, or even a delay until the inclusion of E-L, D&H and B&M in the N&W System is assured, would imperil or delay the inclusion of the New Haven in the merged Penn-Central (p. 12, 14, 19, 61-63). We do find at page 62 ingenious, but in our view plainly untenable, interpretations of the Commission's September 16 Report and the majority opinion in the Court below.

The interpretation of the September 16 Report, contained in two long sentences, involves an attempted articulation with words which bear little resemblance to the words used by the Commission but which are no more specific than those which the Commission did use.

As to the majority opinion in the Court below, the brief asserts that that Court only rejected a contention "that delaying the merger would *delay* the New Haven inclusion", and as to the "altogether different proposition that a delay of several months could imperil" the New Haven's inclusion, "the court stated only that it did not 'rest heavily' on it" (p. 62).

The Court said (A-21):

> "If a temporary injunction would imperil or even seriously delay NH's inclusion, this would indeed weigh most heavily against it. We find no likelihood of a delay."

A reasonable interpretation is that the Court considered a serious delay of the New Haven's inclusion a lesser evil

than an imperilment. It found that there was no likelihood of any delay; by implication the Court certainly found that a temporary injunction would not imperil the New Haven inclusion.

The words "rest heavily" in the Court's opinion are to be found in the last sentence of the Court's discussion, which does not use the words "imperil" or "delay" (A-22):

> "We therefore do not rest heavily on what plaintiffs too derisively term the New Haven panic button."

We have never been able to understand what this sentence means. We do not know what plaintiffs ever spoke of "the New Haven panic button", or, if some plaintiff did use that term, what it was supposed to mean.

In the first paragraph of the argument at pages 39-46 of the New Haven brief it is said that:

> "Any delay in consummation of the merger necessarily creates a risk that the merger will abort and that the New Haven will be forced to liquidate its properties."

The word "any", used in relation to "delay", would embrace any period of time, no matter how short. The word "a", used in relation to the word "risk", would include any risk, no matter how minuscule.

These same words "any" and "a" are used in the key sentence which starts the discussion on page 41. Similar words are relied upon throughout, and they can only be taken to mean that, as E-L said in its brief, as cited by the New Haven at page 43, "if a delay is long enough it may eventually thwart a merger". When the transportation services of E-L and D&H, which the Commission has specifically found to be essential, are at stake and a major issue is whether or not the merger should be allowed to pro-

ceed before E-L and D&H have effective protective conditions, as the Commission has found they should have, it is meaningless to speak of "any delay" and "a risk".

For an analogy we turn to this Court's opinion in *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 87 (1944), in which this Court said that "the Commission must *estimate* the scope and *appraise* the effects of the curtailment of competition". The rule prescribed by the Court meant that it was meaningless to say that there would be "a" curtailment of competition of "some" scope.

It is useless to search the Commission's Reports or the appellees' briefs in an effort to find any *appraisal* of what effect, if any, the granting of the relief which the appellant protected carriers have sought would have on the prospects of the New Haven inclusion in a merged Penn-Central.

In a brief filed on behalf of the Commission in February, 1966 in *Florida East Coast Railway Company* v. *United States and Interstate Commerce Commission* in the Middle District of Florida, Jacksonville Division, after this Court's decision in *Seaboard Air Line Railroad Co.* v. *United States,* 382 U. S. 154 (1965), the Commission's General Counsel said (p. 55):

> "Under *McLean* and *Minneapolis,* the Commission must make a meaningful, penetrating analysis of the results of the proposed merger upon competition in the railroad and other transportation industries ***."

Why is it less important to have a "meaningful, penetrating analysis" of the relationship of the problems of the New Haven to the timing of the consummation of a Penn-Central merger than it is to have a "meaningful, penetrating analysis" of antitrust issues? Where can one find such an analysis in the Commission's Reports or the appellees' briefs?

* * *

The brief for the State of New York and the brief for the three New England States all *assume* that it is important to have a prompt consummation of the Penn-Central merger so that the New Haven can be included. They also *assume* that, if there is a Penn-Central merger, the New Haven will be included.

They make no arguments which seem to us to require any addition to E-L's reply to the arguments made on behalf of the Commission, Penn-Central and the New Haven.

It is not amiss, however, to point out that the provisions of the Commission's April 6 Order were clearly predicated on the expectation that the four States would assume considerable responsibilities for the continuance of the New Haven's operations (see, for example, 327 I.C.C. at 525-527).

How the States have been persuaded that a "prompt consummation" of the Penn-Central merger is important, even if it jeopardizes E-L, D&H and B&M, we do not know. Mr. Saunders' testimony, a copy of which is attached to the brief of the three New England States, may give an inkling.

* * *

Some of the arguments in the cited portion of the New Haven brief which relate to the alleged danger that the Penn-Central merger will "abort" are discussed under the next subheading.

B(2)(e): "The factors that enter into an agreement to merge":

In the penultimate paragraph of the section of the September 16 Report entitled "TIME OF CONSUMMATION", the Commission said (B-15):

> "The factors that enter into an agreement to merge sooner or later can be affected by changing conditions."

As appears from pages 72-75, E-L's brief interpreted the Commission's reference to the "factors that enter into an agreement to merge" as adopting an argument which had been made by the New Haven Trustees in their reply of July 29, 1966 to the petitions for reconsideration. That argument was that in the course of time the "relative values of the separate companies being merged" could change and the terms of the plan, under which holders of Central stock will receive stock of the surviving corporation (Penn with its name changed) on the basis of 1 share of Central stock for 1.3 shares of Penn stock, might become inequitable and impossible to support.

The Commission's brief (p. 54-56), the Penn-Central brief (p. 60-61) and the New Haven brief (p. 42 *et seq.*) all attempt to meet in the same way E-L's point that the "risk that changes in the near future would upset the merger is so minuscule as not to be entitled to any consideration".

They all consider the matter as if a long delay in the consummation of the Penn-Central merger was necessarily involved. In order to do this, they either address themselves to suggestions contained in the Memorandum for the United States or refer to the appellants collectively without regard to the differences in relief which they seek and the time elements involved.

None of the appellees makes any reasoned effort to establish what the Commission had in mind when it spoke of the "factors that enter into an agreement to merge" other than what E-L's brief indicated that the Commission had in mind.

However, all three appellees' briefs refer to matters which could not conceivably be covered by the words "factors

that enter into an agreement to merge". For example, the Penn-Central brief says (p. 60-61):

> "It is evident that so long as a transaction of this kind is held in suspension the parties thereto not only face exceedingly vexing problems of personnel management and morale, but must continue to postpone capital expenditures that are important to continued efficiency as separate carriers but would be largely wasted if the merger were to take place. It was reasonable for the Commission to recognize that problems of this nature — together with all the other difficulties involved in holding a transaction of this magnitude in an executory posture — would present a real danger to the continued viability of the merger plan if substantial additional delay in and uncertainty with respect to consummation existed."

Similar contentions are advanced in the other two briefs. It is stretching the English language far beyond permissible lengths to suggest that the words "factors that enter into an agreement to merge" embrace such matters as are mentioned in the quotation just given. Hence it is not correct to imply that the Commission recognized, and intended to refer to, such matters.

These subjects, the "vexing problems of personnel management and morale", the "postponement of capital expenditures", etc. have only just been introduced into this case. There is nothing in the Commission's Reports or the record before this Court, so far as we know, relating to them. The source of the ideas which this Court is now asked to accept would seem to be testimony which Mr. Saunders, Penn's Chairman, gave on the further hearing on November 16 relating to "capital loss indemnity" (Appendix A to the brief of the three New England States). It is strange enough that Mr. Saunders ever came to give such testi-

mony.[18] It is even stranger that Mr. Saunders' testimony is now used as the basis for a rationalization of what the Commission did on September 16.

The following quotation from *Burlington Truck Lines Inc.* v. *United States,* 371 U. S. 156 at 168-169 (1962), could hardly be more apposite:

> "Commission counsel now attempt to justify the Commission's 'choice' of remedy on the ground that a cease-and-desist order would have been ineffective. The short answer to this attempted justification is that the Commission did not so find. *Securities & Exchange Comm'n* v. *Chenery Corp.,* 332 U.S. 194, 196. The courts may not accept appellate counsel's *post hoc* rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself: * * *"

If the Commission had in mind any such factors as are now attributed to it by the Commission's counsel (p. 54), Penn-Central (p. 60-61) and the New Haven Trustees (p. 42), it certainly failed to "articulate" them.

What the Commission had to say about the factors that enter into an agreement to merge was in the penultimate paragraph of its discussion of "TIME OF CONSUMMA-

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[18] The explanation is that the further hearings relating to capital loss indemnification, and subsequently the further hearings relating to the protective conditions, became arenas in which the Norfolk and Western tried to further its Dereco Plan and Penn-Central undertook to oppose the Dereco Plan and any delay in the consummation of the Penn-Central merger.

Mr. Saunders of the Pennsylvania appeared as a witness called by the N&W after counsel for the N&W had asked to have him subpoenaed. Once on the stand, he took the opportunity to give the testimony — if it can be called such — which will be found in the Appendix to the brief of the three New England States. Naturally what Mr. Saunders had to say received wide publicity.

TION". The fact that it is to be found near the end of that discussion, rather than at the beginning, is not an indication that it is unimportant; quite the reverse. E-L attributed a fairly specific meaning to what the Commission said, and argued that the Commission was arbitrary and capricious. Assuming, *arguendo,* that the appellees' briefs afford some basis for concluding that E-L's interpretation of what the Commission said is not correct, they afford no basis whatever for any conclusion as to what the Commission was referring to. The several rationalizations, differing in expression but not greatly in substance, and all remarkably consistent with the testimony which Mr. Saunders gave on November 16 on the further hearing almost a month after this Court's Order of October 18, seem to us of significance only to the extent that they may create uncertainty as to the Commission's reasons for approving a prompt consummation of the plan. If the appellees' rationalizations have made the Commission's statement about "factors that enter into an agreement to merge" obscure, they have only succeeded in making that feature of the Commission's Report as defective as E-L has argued. An incomprehensible statement of a reason affords no stronger support for a Commission order than a statement which is plainly arbitrary and capricious.

B(2)(f). The savings and improvements in service.

In the foregoing we have made no reference to the Commission's findings as to prospects of savings and improvements in service.

D&H has argued that the Commission should have found to what extent those prospects would be affected by the imposition of effective protective conditions. The circumstance that E-L has not made a similar argument is not to be taken as an indication that it considers the argument unsound.

It should be added that the foregoing discussion of the reasons which the Commission gave for its decision on September 16 in favor of prompt consummation of the merger is not intended to imply that the Commission did not attach weight to the prospects of savings and improvements in service as a result of the merger. E-L's position simply is that the statement under the heading "TIME OF CONSUMMATION" (B-13 through B-16) contains so many "reasons" which are plainly erroneous, arbitrary, capricious or obscure that the statement of reasons, taken as a whole, cannot sustain the Order of September 16.

B(3). The reliance of the majority below on their own "unsupported beliefs, suppositions and conjectures".

At pages 77-82 of E-L's brief several examples were given of statements in the opinion of the majority below based on unsupported beliefs, suppositions or conjectures of the majority.

Some of the examples, including perhaps the most important of all, will be found at pages 77-80. Three separately numbered additional examples were given at pages 80-82.

The Penn-Central brief says that "appellants point to a few passages selected from the District Court's lengthy and comprehensive opinion that are said to reflect ideas not found in the reports of the Commission", and a related footnote purports to summarize two of the examples given by E-L (p. 63-64). An attempt is made to convey the impression that counsel for the appellants searched the majority opinion for flaws, no matter how insignificant, and tried to make much of them.

The statements in the majority opinion to which E-L referred at pages 77-82 did not relate to insignificant matters. Take, for example, this sentence (A-39):

> "The Commission surely can appraise far better than we what effect a year's delay of consummation would have on the jockeying of these roads and of the three plaintiffs in the C&O, B&O, and N&W actions for price and position in respect of other mergers—which, despite all the words, is what we suspect these actions to be mostly about."

The charge of "jockeying" is in the paragraph that immediately precedes the final paragraph, which denies the temporary injunction. It is the heart of the peroration of the opinion. It set forth what the majority said "we suspect these actions to be mostly about". It received national publicity.[19]

None of the appellees disputes that in each of the instances cited by E-L the majority below did rely on its own beliefs, suppositions or conjectures, which were not supported by anything in the record, much less by any Commission finding. Instead, with the exception of Penn-Central, they ignore Point III of E-L's brief (pp. 77-82),

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[19] The summary in footnote 29 on page 64 of the Penn-Central brief of two of the examples cited by E-L cannot be squared with the examples themselves.

The footnote refers to the charge of jockeying as having been made "parenthetically"; there is no basis for saying that it was made "parenthetically".

The footnote summarizes the Court's suspicion as being that this "litigation in large part derives" from "the jockeying"; what the majority said was that the "jockeying" was what it suspected the litigation was "*mostly* about".

The deficiency of the last half of the footnote, which purports to summarize another example, will be evident by comparing the footnote with the example at pages 80-81 of E-L's brief.

presumably in the hope that this Court will also. The Penn-Central brief advances two astonishing propositions (p. 64).

The first is that the majority's reliance on its own unsupported beliefs, suppositions and conjectures is irrelevant "absent a plausible showing that the ideas expressed in the passages referred to played a role in the District Court's decision so vital that the court might reasonably have been expected to reach a different result without them". If such a showing were required, it would mean that E-L would have to put aside all of the other errors in the majority's opinion and show that the particular errors cited in Point III were decisive. The examples given in Point III of reliance on the majority's own unsupported beliefs, suppositions and conjectures are important not merely because such a reliance is not permissible, but because it illuminates other errors which the majority made.

The Penn-Central brief next urges that, if "the posture of this case in this Court is such that it should be treated in substance as if it were here on appeal from a final rather than an interlocutory judgment", the appellants have the burden "to show not merely error in the trial court's decisional process but error in the action of the Commission that they seek to enjoin". We agree with what the Penn-Central brief says if it is carried to its logical conclusion, which is that, if the only issue is whether the Commission erred, the majority opinion should be disregarded in its entirety.

The Penn-Central brief does not follow any such course. What Penn-Central seek to do is to treat as "irrevelant" or "beside the point" undisputed errors in the majority opinion, on the ground that the Court below should be reversed only if error in the action of the Commission is established, but at the same time use statements in the ma-

jority opinion as ammunition when they can find nothing else to say in answer to contentions of the appellants. See, for examples in the Penn-Central brief, pages 24 and 41.

CONCLUSION

E-L is glad to adopt, as a summary of the first ground for its appeal, Judge Weinfeld's statement in his concurring opinion in the *Gruss* case (Appendix A to the brief of the New Haven Trustees, footnotes omitted):

> "In the *Erie* case the Commission found that the public interest required protection of the three carriers against the adverse effects of the merger, and as a condition of consummation imposed specific protective terms which it subsequently revoked ex parte, in my view without adequate supporting findings, as to one condition and left for future determination as to others. The terms and conditions as originally delineated by the Commission were a sine qua non of the merger."

As we have shown, the appellees' briefs do not really treat with this ground for E-L's appeal. They virtually ignore the findings which E-L quoted in its main brief at pages 18-19, as well as the absence of any adequate findings in the Commission's Report of September 16.

They do not give any adequate answer to E-L's Point II (p. 62-77) or Point III (p. 77-82).

Granted that, if there be a compliance with the applicable statutes, the Penn-Central merger may have significant advantages to the public, E-L also serves the public, and the findings of the Commission on which E-L has relied are replete with references to the public interest, shippers and connections.

E-L's appeal and that of the D&H, standing by themselves, would merit a reversal of the Order of the Court below and the relief prayed for in E-L's brief (p. 83-84).

The Memorandum for the United States asks for different, but perhaps not necessarily inconsistent, relief. The appellants City of Scranton and Shapp challenge the Commission's Orders on far broader grounds than E-L and D&H. The N&W and the five other "unprotected carriers" associated with it on these appeals have objectives very different from those of E-L and D&H. The objectives of C&EI are also different, although not in the same degree.

Whatever disposition the Court makes of the appeals of the "unprotected carriers", City of Scranton and Shapp, E-L submits that its appeal, and that of the D&H, should be successful.

January 6, 1967.

Respectfully submitted,

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Appendix A

INTERSTATE COMMERCE COMMISSION

Served December 27, 1966

Finance Docket No. 21989[1]

PENNSYLVANIA RAILROAD COMPANY—MERGER—
NEW YORK CENTRAL RAILROAD COMPANY

(Names of counsel who appeared for
various parties omitted.)

REPORT AND ORDER ON PREHEARING CONFERENCE
BY ARTHUR S. PRESENT, HEARING EXAMINER

On April 6, 1966, pursuant to an application filed under Section 5(2) of the Interstate Commerce Act, the Commission approved and authorized the merger of The New York Central Railroad Company into The Pennsylvania Railroad Company (sometimes hereinafter referred to as Penn-Central), subject, among other conditions, to inclusion in the transaction of The New York, New Haven and Hartford Railroad Company, a debtor in reorganization under Section 77 of the Bankruptcy Act (sometimes hereinafter referred to as New Haven or debtor), Richard Joyce Smith and William J. Kirk, Trustees[2] "upon such fair and equitable terms as the parties may agree subject to the approval of the Bankruptcy Court and the Commission." 327 I.C.C. 475, 553, modified 328 I.C.C. 304 (1966).[3]

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[1] Embraced herein are Finance Docket No. 21990, Pennsylvania Railroad Stock Issuance; Finance Docket No. 24361, Pennsylvania Railroad Company Securities and Assumption of Obligations; and Finance Docket No. 21669, New York, New Haven & Hartford Railroad Company Reorganization.

[2] The Trustees of the New Haven had petitioned for inclusion under Section 5(2)(d) on June 26, 1962.

[3] The Commission's order has been stayed by the United States Supreme Court pending disposition of appeals, *Erie-Lackawanna v. United States*, 87 S. Ct. 224 (1966).

The parties filed their plan for inclusion and other pleadings on October 27, 1966, and, thereupon, the Commission by order of November 9, 1966, assigned the following matters for hearing on a consolidated record:

1. In Finance Docket Nos. 21989 and 21990, the joint petition of The Pennsylvania Railroad Company and The New York Central Railroad Company for approval of a plan to purchase substantially all of the assets and assume certain obligations of the New Haven; and the related supplemental petition of the Trustees of the New Haven for inclusion in the proposed Penn-Central system;

2. In Finance Docket No. 24361, the application of The Pennsylvania Railroad Company, in connection with the aforesaid purchase, for authority to issue securities and to assume obligation and liability with respect to securities of others; and

3. In Finance Docket No. 21669, the request of the Trustees of the New Haven for approval of a plan of reorganization.

In order to achieve orderly procedures and expedited disposition of the proceedings, the Commission, pursuant to Rule 1.68 of its General Rules of Practice, directed that a prehearing conference be held on December 19, 1966. The actions taken at the conference are set forth herein.

Participants and Positions

At the prehearing conference, appearances were entered on behalf of the following participants and their respective positions were indicated as follows:

A. *Petitioners*

1. Trustees of the New York, New Haven and Hartford Railroad Company

2. New York Central Railroad Company
3. Pennsylvania Railroad Company

B. *Interveners in Support of Petitioners*

1. United States of America
2. State of Connecticut
3. Commonwealth of Massachusetts
4. State of New York
5. State of Rhode Island

C. *Intervener to File a Plan for Reorganization of the Debtor*

1. Marshall Barnes, Security Holder of Debtor

D. *Interveners in Opposition to Terms of Proposed Plan*

1. Chase Manhattan Bank, N. A., Trustee, Debtor's General Income Mortgage Indenture
2. John O. Ehrenclou, Security Holder of Debtor[4]
3. Debtor's First Mortgage 4% Bondholders Committee
4. Oscar Gruss & Son, Security Holder of Debtor[5]
5. Manufacturers Hanover Trust Company, Trustee, Debtor's First and Refunding Mortgage Indenture

[4] This security holder opposes inclusion of the New Haven in the Penn-Central system, and claims that, if it should be included, the consideration under the plan proposed by petitioners is inadequate.

[5] This security holder has a proposal which depends on negotiation and agreement with the Pennsylvania Railroad and the New York Central.

6. United States Trust Company, Trustee, Debtor's Harlem River Division Indenture[6]

E. *Railroads Intervening In Opposition Unless Appropriate Traffic Protective Conditions Are Imposed*

1. Boston and Maine Corporation
2. Central Railroad Company of New Jersey
3. Erie-Lackawanna Railroad Company
4. Norfolk and Western Railway Company
5. Reading Company
6. Western Maryland Railroad Company

F. *Intervener As Its Interest May Appear*

1. Providence and Worcester Railroad Company

G. *Protestant*

1. Milton J. Shapp

ISSUES

The issues were formulated in relation to the sections of the statutes involved. Stated generally they are as follows:

A. Section 5 of the Interstate Commerce Act

Are the terms of the plan presented by petitioners for inclusion of the New Haven in the proposed Penn-Central system fair and equitable? Without limiting the sub-issues certain such issues were specified and are set forth below.

[6] This intervener's interest concerns the provision in the agreement between the Trustees of the New Haven and the Penn-Central which permits the Penn-Central to assume the obligation on the debtor's outstanding Harlem River Division bonds. The intervener requests that the provision be amended to require assumption of liability on the bonds.

1. Is it legally possible to include the New Haven in the proposed Penn-Central system without the consent of security holders?
2. What indemnity provisions, if any, should be imposed to protect the New Haven against the diversion of freight traffic until inclusion takes place?
3. What traffic conditions, if any, should be imposed to protect the railroads intervening herein?
4. Under what terms and to what extent should the motor carrier operating rights of the New England Transportation Company be transferred to the control of the Penn-Central system?
5. What labor conditions should be imposed to protect New Haven Railroad employees?

B. Section 20a of the Interstate Commerce Act

Are the issuance of bonds and shares of stock and the assumption of obligations or liabilities with respect to securities of the New Haven as proposed by the Pennsylvania Railroad Company:

1. For some lawful object within the corporate purpose of The Pennsylvania Railroad Company?
2. Compatible with the public interest?
3. Necessary or appropriate for or consistent with the proper performance by The Pennsylvania Railroad Company of service to the public as a common carrier and will the issuance and assumption impair its ability to perform that service? and
4. Reasonably necessary and appropriate for such purposes?

C. Section 77 of the Bankruptcy Act

With respect to the plan proposed by the New Haven Trustees and filed on October 27, 1966, with

the Commission,[7] without limiting the issues, those specified were as follows:

1. Does the plan constitute a plan within the meaning of section 77 of the Bankruptcy Act?[8]
2. Is the plan fair and equitable?
3. Is the plan feasible?

Stipulations

* * *

It was agreed that each of the railroads interested in traffic protective conditions, including Penn-Central, has the responsibility of attempting to reach a stipulation on traffic protective conditions. In addition, the Pennsylvania Railroad indicated that by the time the hearing commences it hopes to reach agreements on protective conditions with the various railway labor organizations representing New Haven employees.

* * *

The hearing examiner advised the parties that each of them has the responsibility of ascertaining other areas for stipulation and attempting to enter into appropriate stipulations.

Submission of Evidence and Procedures

It was provided that a party who has not received a copy of any of the four pleadings (the joint petition of Penn-

[7] The debtor filed a plan with the Commission on March 7, 1962. No appearance was filed on behalf of the debtor at the prehearing conference, and it appears that no one intends to present evidence in support of that plan.

Marshall Barnes and an informal group of bondholders intend to submit a plan for reorganization of the debtor.

[8] The legal sufficiency of the plan was also discussed by the parties under Section 5 of the Interstate Commerce Act, but it appears to fit more properly as an issue under the Bankruptcy Act.

Central, the supplemental petition filed by the New Haven Trustees, the Pennsylvania Railroad Company section 20a application, and the plan for reorganization submitted by the New Haven Trustees) filed on October 27, 1966, should transmit a request in writing to the proper petitioner.

Under the order of procedures at the hearing, the Trustees of the New Haven will go first. They intend to adduce their evidence through 12 witnesses. Counsel announced the names of the witnesses, the general subject matter of their testimony, and the order in which they would be presented. Penn-Central will follow. The State of Connecticut will have one witness and he will be heard out of turn as set forth hereinafter. The order of proceeding for other parties will be designated during the course of the hearing. The matter of traffic conditions will be considered during the latter part of the hearing, and attorneys for railroads only interested in this aspect of the case were excused from appearance at the hearing until that matter is taken up. However, it is their burden to keep informed of the progress of the hearing and to be prepared to proceed with their cases when required to do so.

It is anticipated that most, if not all, evidence in chief will be in written form and distributed in advance of the appearance of the sponsoring witness. Except as set forth below the dates for distribution of evidence will be determined during the course of the hearing.

The dates for placing written testimony and other exhibits in the mail are as follows:

A. Testimony and exhibts of Witness Smith for the Trustees of the New Haven — December 30, 1966.

B. Testimony and exhibits of the State of Connecticut — January 4, 1967.

C. Remaining testimony and exhibits of the Trustees of the New Haven — January 6, 1967.

Hearing is to commence on January 16, 1967, at the Hotel Biltmore, 43rd Street and Madison Avenue, New York, N. Y., at 9:30 a.m. The witness for the State of Connecticut will appear on January 19, 1967. It is contemplated that all hearings will be in New York City.

* * *

ORDER

IT IS ORDERED, That hearing in the instant proceedings shall be held in accordance with the agreements of the parties and the procedures hereinbefore set forth unless, for good cause, the hearing examiner determines that some modification of such procedures is necessary or desirable.

IT IS FURTHER ORDERED, That objections to the report and order on the ground that it does not fully or correctly embody the agreements reached at the prehearing conference or the rulings of the hearing examiner shall be filed within ten days from the date of service of this order.

Dated at Washington, D. C., this 21st day of December, 1966.

By the Commission, Arthur S. Present, Hearing Examiner.

H. NEIL GARSON,
Secretary.

(SEAL)

Appendix B

Decisions cited by the Commission or Penn-Central as precedents for the deferment of the determination of the protective conditions until after the merger.

At pages 58-60 the Commission's brief cites a number of decisions as precedents for the Commission's action, in the September 16 Report and Order, in authorizing consummation of the Penn-Central merger and deferring the determination of the protective conditions until later (except that the original Appendix G traffic conditions would remain in effect unless and until modified).

Baltimore Steam Packet Co. Acquisition and Control, 244 I.C.C. 583 (1941), the first of four Commission decisions cited at page 58, involved, among other things, the acquisition by the Receivers of the Seaboard Air Line Railway Company of control of the Baltimore Steam Packet Company through ownership of its capital stock. The only portion of the Report of the Commission, by Division 4, which can conceivably have any bearing on the subject to which this Appendix relates will be found at pages 604-605. If there appears that the basis for the action taken by the Commission was a finding that "there is a possibility that if the accounting work for the Baltimore Company is done by its own accounting force, *the Seaboard may abolish about three positions* in its accounting department at Portsmouth." The action taken by the Commission was as follows:

> "Since it has not yet been determined whether the employment of employees of the Seaboard is to be affected, our authorization and approval herein will be granted upon condition that the Seaboard comply with such supplemental order with respect to protection of its employees who may be affected in their employment

as, for good cause shown, we may issue hereafter in this proceeding and, pending such order, will deprive none of such employees of his or her employment by reason of the proposed transactions."

Needless to say, what the Commission did in *Baltimore Steam Packet Co. Acquisition and Control* is in no way comparable to what it did by its September 16 Report relating to the Penn-Central merger.

The next case cited in the Commission's brief is *Wabash Railroad Company Control*, 247 I.C.C. 365 (1941), which involved the acquisition by the Pennsylvania Railroad Company and the Pennsylvania Company of control of Wabash Railroad Company. The only relevant portion of the Report of the Commission, by Division 4, is at pages 375-376. There it appears that there was to be no consolidation and that it did "not appear that there would be any change in the nature or condition of employment of the employees of either carrier involved in the transaction". However, the applicants anticipated that "there may from time to time be coordinations of service or facilities which may adversely affect the employees of one or both of such carriers". The applicants, therefore, after consultation with counsel for the Railway Labor Executives' Association, suggested a reservation of jurisdiction, applicable to the carriers and their employees, if any such contingency or contingencies should arise, and the Commission adopted that suggestion. Here again it cannot be said that what the Commission did resembled in any way what it did on September 16, 1966.

Chicago & North Western Railway Company Merger, 261 I.C.C. 672 (1946), involved the merger of the Escanaba, Iron Mountain and Western Railroad Company (Escanaba) into the Chicago and North Western Railway

Company (North Western). The relevant portion of the Report of the Commission, by Division 4, is at pages 674-675. Escanaba had been and was being operated by North Western under lease and had no employees. However, the Railway Labor Executives' Association intervened and contended that every order under Section 5(2) of the Interstate Commerce Act should contain a provision in the language of the second sentence of Section 5(2)(f). Division 4 decided that in order to follow a uniform practice it would incorporate in every Section 5(2) order a direction in the language of the second sentence of Section 5(2)(f), exclusive of the introductory words of that sentence, except in circumstances "wherein conditions have been prescribed, or agreed upon by the parties as permitted by the last sentence in section 5(2)(f)". The Commission did not reserve jurisdiction; it included in its order authorizing the merger the language which Section 5(2)(f) said should be included. It is obvious that what the Commission did is in no way a precedent for its deferment in this case of the determination of the protective conditions for E-L, D&H and B&M.

Midwest Buslines, Inc.—Purchase—American Buslines, Inc., 80 M.C.C. 681 (1959), was a motor carrier case. The Commission's Report, by Division 4, indicated at page 688 that it did not consider the mandate of Section 5(2)(f) of the Interstate Commerce Act applicable to motor carrier transactions, but that "the act, taken as a whole, makes clear the congressional intent that public policy demands fair and equitable treatment of employees of motor carriers as well". The Report further said that:

> "In cases where jurisdiction has been reserved, it generally was because doubt existed as to what, if any,

> adverse effect consummation of the transaction under consideration would have upon employees and it was not feasible to prescribe specific conditions to protect their interests [citing an example]. Where the record has definitely shown adverse effect, specific conditions have been prescribed [citing examples]."

Division 4 found that there was insufficient evidence on which specific conditions could be based but that since some employees might be adversely affected the Commission would "reserve jurisdiction with respect to employee matters for a period of 3 years from date of consummation herein". The reservation of jurisdiction applied only to so many drivers, out of a total of 42, as might be adversely affected.

The next decisions cited in the Commission's brief are *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, 434-436 (1951); *American Trucking Ass'ns.* v. *United States*, 355 U.S. 141, 154 (1957) (page 59). Both were discussed in Judge Weinfeld's dissenting opinion below (A-54 through A-56). We see no occasion to attempt to supplement what Judge Weinfeld said.

The Commission next cites *New York Central Unification*, 154 I.C.C. 489 (1929), which led to this Court's decision in the *New York Central Securities Co.* v. *United States*, 287 U.S. 12 (1932). When authorizing New York Central Railroad Company to acquire control by lease of the railroad systems of the "Big Four" and Michigan Central Companies, the Commission required the New York Central to acquire certain specified short-line railroads. The Commission's authority to impose such a requirement was upheld by this Court, but this Court did not pass upon, and presumably was not asked to pass upon, any question whether the acquisition of all or any of the short lines had

to take place before the lease was effected (287 U.S. at 28). The Commission's order authorizing the lease of the "Big Four" and the Michigan Central provided that it should become effective even though, as stated in the Commission's brief, "the purchase terms for inclusion of some of the short lines was still subject to arbitration" (154 I.C.C. at pages 490-494). However, the Commission had provided for the machinery of the arbitrations; in the cases of all the railroads except one the arbitration had proceeded without controversy; and in the case of that one the Commission resolved the only controversy.

Alton Railroad Company Acquisition and Stock Issue, 175 I.C.C. 301, 313 (1931), 189 I.C.C. 271 (1933); *Union Pacific Railroad Company Unification*, 189 I.C.C. 357, 363 (1933) and *Florida East Coast Railway Co.* v. *United States*, now reported at 259 F. Supp. 993, the cases next cited by the Commission, all involved conditions similar to that in Appendix O to the Commission's Report in the Norfolk & Western merger case (quoted in footnote 14 on page 14 of E-L's brief) and Section 8 of Appendix A of the April 6 Report in this case, 327 I.C.C. at 553.

In the case next cited (p. 60), *Illinois Central R. Co., et al.* v. *United States, et al.*, (N.D. Ill., Civil Action No. 65 C 1393, decided August 4, 1966), a statutory three-Judge Court in the Northern District of Illinois upheld an order of the Commission which authorized the Missouri Pacific (MoPac) to acquire stock control of the Chicago & Eastern Illinois (C&EI) and sustained the Commission's imposition of a condition under which, if MoPac assumed control of C&EI, it should take steps to cause C&EI to negotiate for the sale to the Louisville & Nashville (L&N) of C&EI's Evansville-Chicago line. The legality of the

condition was not challenged by MoPac, C&EI or L&N; it was challenged by the Illinois Central, which presumably wanted to keep the L&N from having a line to Chicago. Furthermore, it was not challenged on the ground that the condition was "a condition subsequent", as it is characterized in the Commission's brief, but on the ground that the Commission had in effect ordered "an involuntary sale" by the C&EI of its Evansville line. That challenge was not upheld because the Court interpreted the condition as providing that the sale should occur only if the C&EI and L&N "conclude satisfactory good faith negotiations". We see no relationship between the decision of the three-Judge Court in *Illinois Central R. Co.* v. *United States* and any issue on this appeal.

At page 60 the Commission's brief cites six decisions, four in this Court and two in District Courts, in support of the propostion that: "Generally, the power of regulatory agencies to deal with complex problems in logical stages is settled". Only one of the six cases involved the Interstate Commerce Commission. The proposition for which the six cases are cited is altogether too general to make it suitable to summarize what they involved.

Of the decisions cited in the Penn-Central brief at pages 27-28, all those cited in footnote 13 on page 27 were cited in the Commission's brief and have already been discussed. The same thing is true of *United States* v. *Rock Island Motor Transit Co.* and *American Trucking Ass'ns, Inc.* v. *United States.*

A. C. Allyn and Co. et al—Control 50 M.C.C. 305, 310-311 (1948), is generally cited as *Transcontinental Bus System, Inc.—Control—Continental,* which is the short

title used in the Report. It appears to be similar in every way to *Midwest Buslines, Inc.—Purchase—American Buslines, Inc.*, discussed above at p. iii-iv.

The Greyhound Corp.—Control, 57 M.C.C. 123, 156-157 (1950), followed *Transcontinental Bus System, Inc.—Control—Continental*. So also did *The Greyhound Corp.—Merger*, 70 M.C.C. 59, 68-69 (1956), in which it appeared, at page 65 of the Report, that there was no showing of adverse effects upon employees.

In *Safeway Trails, Inc.—Control*, 70 M.C.C. 573, 577-578 (1957), the factual situation appears at pages 576-577. The Commission, by Division 4, found that "concern as to the possible adverse effect upon the Quaker City drivers seems unwarranted", but nevertheless reserved jurisdiction as in the three cases just referred to.

All four of the decisions just mentioned involved transactions in which it was expected that the effects of the transactions on employees, if any, would be slight; the record does not show, and in some instances it was impossible to forecast, what the effects, if any, might be; and the Commission reserved jurisdiction to cover the possibility that one or more employees might be adversely affected. They might be cited as supporting the proposition that it is not necessary for the Commission to provide specific conditions, complete in every detail, to cover every contingency, but E-L has never contended that there was any such requirement.

American Trucking Ass'ns, Inc. v. *Frisco Transportation Co.*, 358 U. S. 133 (1958), merely sustained the power of the Commission, under Section 17(3) of the Interstate Commerce Act, to correct inadvertent ministerial errors.

Penn-Central cites *Atlantic Refining Co.* v. *Public Service Commission,* 360 U. S. 378, 392 (1959), which involved Section 7 of the Natural Gas Act and was cited in the majority opinion below. We confess our inability to see how it is relevant to the issue under consideration.

The Penn-Central brief states at page 29 that "appellants primarily rely upon *Scenic Hudson Preservation Conference* v. *Federal Power Commission,* 354 F. 2d 608 (2d Cir. 1965), *cert. denied,* 384 U. S. 941." E-L has not cited *Scenic Hudson Preservation Conference.* Nor has it cited *United States* v. *Chicago, M., St. P. & P. R. Co.,* 294 U. S. 499, mentioned at pages 29-30.

As stated at page 30 of the brief to which this is an Appendix, E-L has never contended that every detail of every condition relating to every Section 5(2) transaction must be determined before the transaction can be authorized. Its contention has been and is that there is a limit beyond which the Commission cannot go in deferring, until after the consummation of a railroad merger, the determination of "just and reasonable conditions", and that in this instance the Commission's Report of September 16 went beyond that. None of the decisions cited by the Commission or Penn-Central indicates that E-L's contention is unsound.

Judge Weinfeld said (A-56):

> "* * * all cases cited by the majority serve to put in proper focus the extraordinary nature of the power here contended for."

The same thing can be said of all of the cases cited by the Commission or Penn-Central which were not cited by the majority below.

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